



Legal Update

November 5, 2013

Constructive Possession

Additional factors “tipped the scale” to prove that the defendant had the knowledge, ability and intent to constructively possess drugs in his girlfriend’s car!

Commonwealth v Jimmy Lee Crapps Jr., 84 Mass. App. Ct. 442 (2013)

Background: The Springfield police were conducting surveillance of the defendant whom they observed driving a Lexus sport utility vehicle. The vehicle was registered to the defendant’s girlfriend who lived with the defendant. On July 23, 2009, the police observed the defendant driving the vehicle alone without any passengers. The defendant drove to a store parking lot and a female entered the passenger side of the vehicle. The defendant drove a short distance and the female got out the vehicle and walked away. Based on their observations, the police stopped the vehicle and searched the inside. The police recovered a tube sock from the center console that contained thirty six (36) individual packs of crack cocaine, a large chunk of crack cocaine and cash. Additionally, the police found personal papers belonging to the defendant on the passenger seat, the defendant’s cell phone stored in the driver’s side door and \$585 dollars in the defendant’s pockets. The defendant was charged and convicted of trafficking crack cocaine. The defendant appealed and argued that the Commonwealth failed to prove he had constructively possessed the drugs and he also challenged the methods used to measure the weight of the drugs.

Conclusion: The Court affirmed the convictions and held that there was sufficient evidence to

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prove that the defendant constructively possessed the drugs. In order to prove constructive possession the Commonwealth must show that a defendant:

- (a) had knowledge of the contraband
- (b) ability to control the contraband and;
- (c) intent to exercise control over it.

In this case, the Court held that it was reasonable to infer the defendant knew there were drugs in the vehicle because the defendant was the only person driving the vehicle. Although the defendant's girlfriend was the registered owner of the vehicle, the police found the defendant's cell phone and personal papers on the passenger seat when they searched the vehicle. Additionally, the Court found these factors also support the inference that the defendant had exclusive control of the vehicle. The last issue the Court examined was whether the defendant intended to exercise control over the drugs within the vehicle. During their surveillance of the defendant, the police observed a female get into the vehicle with the defendant. The defendant drove a short distance, and let the female out of the vehicle which indicated the defendant was engaged in suspicious activity. Collectively, the defendant's actions along with the additional incriminating evidence "tip the scale" to prove that there was sufficient evidence that the defendant constructively possessed the drugs recovered from the vehicle.

Commentary: Recently, there have been numerous appeals regarding constructive possession of firearms and drugs. The issue that appears to be the turning point in most of the cases is whether the defendant had *intent to exercise control over the contraband*.

In *Hamilton* the Court emphasized how "proof of possession of a controlled substance may be established by circumstantial evidence, and the inferences that can be drawn there from." *Commonwealth v Deanna Hamilton*, 83 Mass. App. Ct. 406 (2013). The police executed a search warrant for an apartment where they found the defendant, Deanna Hamilton, (hereinafter referred to as "Hamilton") along with her boyfriend sitting on couch with crack cocaine laying on the coffee table in front of them. As police searched the apartment they observed *only* women's clothing, women's perfume, and women's lotions in the bedroom, but did not observe any men's clothing there. While the defendant and her boyfriend were being booked, both listed the apartment as their address. Since police did not find cocaine on Hamilton, she was tried on a theory of constructive possession. Based on the items found in the apartment, it was reasonable to infer that the Hamilton knew there were drugs in the apartment and she had the ability and intent to exercise dominion and control over it.

The Court in *Romero*, established that "mere presence" failed to prove that the defendant intended to exercise control of the gun. *Commonwealth v Eric Romero*, 464 Mass. 648 (2013). In *Romero*, the Court found that that the defendant knew there was a firearm in the vehicle. The defendant was the registered owner of the vehicle and he was seated adjacent to the passenger who was openly handling the firearm when the police approached the vehicle. The Court's decision hinged on whether there was sufficient evidence to prove the defendant intended to

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exercise control over the firearm. Although the defendant was the owner of the vehicle and was present in the vehicle, there was nothing specifically connecting him to the firearm. The defendant was “not wearing a holster sized to fit the firearm nor was he carrying ammunition that matched the weapon.” Furthermore, the Court emphasized that the defendant’s interaction with the police proved that he did not intend to exercise control over the firearm. The defendant made no attempt to conceal or dispose of the firearm when police approached. Without additional incriminating evidence to “tip the scale in favor of sufficiency, presence alone cannot show the requisite knowledge, power, or intention to exercise control over contraband.” *Commonwealth v. Albano*, 373 Mass. 132, 134 (1977), quoting *United States v. Birmley*, 529 F.2d 103, 108 (6th Cir. 1976).

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